

Appl. No. 10/633,738
Atty. Docket No. 9151R
Amdt. Dated: February 10, 2005
Reply to Office Action of December 15, 2004
Customer No. 27752

REMARKS

Claims 1-32 are pending in the present invention. No additional claims fee is believed to be due.

Rejection Under 35 USC 103(a) Over Nakamura et al (US 6,045,847) in view of Marlett et al (US 6,287,609) or Colliopoulos (US 5,009,916)

The Examiner states that claims 1-27 are rejected under 35 USC § 103(a) as being unpatentable over Nakamura et al (US 6,045,847) in view of Marlett et al (US 6,287,609) or Colliopoulos (US 5,009,916). The Examiner states that Nakamura discloses a composition comprising a water-soluble hemicellulose, which is a polysaccharide containing xylose and arabinose. Additionally, the Examiner states that when Nakamura is combined with the Marlett the ratio of xylose to arabinose is at least 3:1. Applicants respectfully traverse the Examiner's rejection on the basis of the comments below.

Applicants assert that the Examiner has failed to establish a *prima facie* case of obviousness. Nakamura and Marlett or Colliopoulos do not teach or suggest all of the claim limitations of Claims 1-32 and, therefore, do not establish a *prima facie* case of obviousness. "To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art." MPEP § 2143.03 citing *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). "All words in a claim must be considered in judging the patentability of that claim against the prior art." MPEP § 2143.03 citing *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970).

The Nakamura references discloses the use of a water-soluble hemicellulose that is derived from husks of oily seeds of soybean, palm, coconut, corn or cottonseed with the oil and protein removed, and lees from grains such as rice or wheat and roots such as beets with the starch or sugar removed. *See* Column 3, lines 44-51. Each of these fibers is water soluble and is rapidly broken down in the colon. Due to this fact, these fibers have no laxative effects on the bowel and are not effective at treating constipation and other disorders of the bowel.

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The psyllium seed husks derived polysaccharide components of the present invention are not readily broken down in the colon so they pass through the colon and aid in making the stool soft and easy to eliminate thereby aiding in treating constipation and other bowel disorders. Additionally, Nakamura fails to teach or suggests a polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3 : 1, by weight, in combination with a dispersing component selected from the group consisting of binders, suspending agents, edible acids, and mixtures thereof that is disclosed and claimed in the present invention.

The Examiner states that Marlett teaches the preparation of fractions obtained from psyllium seed husk that comprises xylose and arabinose. However, Marlett fails to teach or suggest a polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3: 1, by weight, and a dispersing component selected from the group consisting of binders, suspending agents, edible acids, and mixtures thereof that is disclosed and claimed in the present invention.

Nakamura and Marlett both fail to provide Applicants' essential polysaccharide component that comprises xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3: 1, by weight, in combination with a dispersing component selected from the group consisting of binders, suspending agents, edible acids, and mixtures thereof that is disclosed and claimed in the present invention.

Assuming *arguendo* that one having ordinary skill in the art would combine the disclosures of Nakamura and Marlett, one would still fall short of the of Applicants' claimed invention only to arrive at a water-soluble hemicellulose that is water soluble and is rapidly broken down in the colon and wherein the composition comprises xylose and arabinose. The combination of Nakamura and Marlett do not teach or suggest each and every element of Applicants' presently claimed invention. The polysaccharide component of the present invention, therefore, cannot be rendered as obvious over the teachings of Nakamura in view of Marlett.

The Examiner states that Colliopoulos teaches a psyllium high fiber drink mix made by agglomerating a base comprising at least 5 to 99 weight percent psyllium mucilloid.

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However, the present invention is directed to certain fractions of psyllium seed husk. The psyllium high fiber in the Colliopoulos reference when it comes in contact with water would form a gelatinous mass and would exhibit very poor dispersability. The present invention comprises composition that contain certain fractions of psyllium seed husk with defined ratio of xylose and arabinose combined with a dispersing component wherein the composition can comprise an agglomerate which comprises from about 10% to about 90% of polysaccharide component which are intended for dilution in an aqueous liquid and provide excellent mouth feel, excellent dispersion in an aqueous liquid and sedimentation. The present invention teaches the removal or fractioning off of the components which contribute to the unpleasant or unsafe qualities of the psyllium husk. Therefore, one of ordinary skill in the art would not be motivated to combine the teaching of Colliopoulos with Nakamura or Marlett since the teachings of Colliopoulos fail to teach or suggest the use of agglomerate that comprises from about 10% to about 90% of a polysaccharide component that are fractioned off of the psyllium seed husk.

The combination of Nakamura and Marlett or Colliopoulos does not teach or suggest each and every element of Applicants' presently claimed invention. The polysaccharide component combined with the dispersing component of the present invention, therefore, cannot be rendered as obvious over the teachings of Nakamura in view of Marlett or Colliopoulos. "Citing a reference that merely indicates that isolated elements and/or features recited in the claims are known is not sufficient basis for concluding that the combination of claimed elements would be obvious." *See Ex parte Hiyamizu*, 10 U.S.P.Q. 2D (BNA) 1393, 1394 (1988). "The genius of invention is often a combination of known elements which in hindsight seems preordained. To prevent hindsight invalidation of patent claims, the law requires some 'teaching, suggestion, or reason' to combine cited references." *See McGinley v. Franklin Sports, Inc.*, 262 F. 3d 1339, 60 USPQ2d 1001 (Fed. Cir. 2001). "Determinations of obviousness can not be based on the hindsight combination of components selectively culled from the prior art to fit parameters." *See ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 48 USPQ2d 1321 (Fed. Cir. 1998). "There should be something in the prior art or a convincing line of reasoning in the answer suggesting the desirability of combining the reference in such

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a manner as to arrive at the claimed invention." *In re Dembiczak* 175 F. 3d 994, 999 (Fed. Cir. 1999).

Accordingly, Claims 1-32 are novel and nonobvious over Nakamura et al (US 6,045,847) in view of Marlett et al (US 6,287,609) or Colliopoulos (US 5,009,916) and reconsideration and withdrawal of the rejection is respectfully requested.

Rejection Under 35 USC 103(a) Over Nakamura et al (US 6,045,847) and Marlett et al (US 6,287,609) in view of Barbera (US 5,425,945)

The Examiner states that claims 11 and 14 are rejected under 35 USC § 103 as being unpatentable over Nakamura et al (US 6,045,847) and Marlett et al (US 6,287,609) in view of Barbera (US 5,425,945). Applicants respectfully traverse this rejection based on the remarks contained herein.

Applicants assert that the arguments presented above regarding Nakamura and Marlett in traversing the § 103(a) rejection also apply to the present rejection. The references do not teach or suggest the essential polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3: 1, by weight, in combination with a dispersing component selected from the group consisting of binders, suspending agents, edible acids, and mixtures thereof that is disclosed and claimed in the present invention.

The Examiner states that Barbera discloses agglomerated psyllium husk containing edible acid, wherein the edible acid include citric acid and also sets forth the use of maltodextrin as the agglomerating material. Barbera discloses agglomerating material including water dispersible hydrolyzed starch oligosaccharide, monosaccharide, disaccharide, polyglucose, polymaltose, and mixtures thereof which is used as an agglomerating material coating on said psyllium husk. *See* Column 3, lines 40-52. Also, the edible acids are dispersed throughout the agglomerating material coating on the psyllium husk. *See* Column 4, lines 53-59. In the present invention, the agglomerate comprises the polysaccharide component and can comprise a dispersing component that is not coated on the agglomerate but either a component of the agglomerate or distinct from the agglomerate. The present invention can comprises one or more layers surrounding the agglomerate but these

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layers are a hydrophobic layer comprised of material selected from fatty acids, fatty acid derivatives, polymers and mixtures.

Therefore, Babera fails to teach or suggest polysaccharide component that comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3:1, by weight, in combination with a dispersing component selected from the group consisting of binders, suspending agents, edible acids, and mixtures thereof that is disclosed and claimed in the present invention.

The combination of Nakamura and Marlett or Babera does not teach or suggest each and every element of Applicants' presently claimed invention. The polysaccharide component in combination with the dispersing component of the present invention, therefore, cannot be rendered as obvious over the teachings of Nakamura in view of Marlett or Babera. "Citing a reference that merely indicates that isolated elements and/or features recited in the claims are known is not sufficient basis for concluding that the combination of claimed elements would be obvious." *See Ex parte Hiyamizu*, 10 U.S.P.Q. 2D (BNA) 1393, 1394 (1988). "The genius of invention is often a combination of known elements which in hindsight seems preordained. To prevent hindsight invalidation of patent claims, the law requires some 'teaching, suggestion, or reason' to combine cited references." *See McGinley v. Franklin Sports, Inc.*, 262 F. 3d 1339, 60 USPQ2d 1001 (Fed. Cir. 2001). "Determinations of obviousness can not be based on the hindsight combination of components selectively culled from the prior art to fit parameters." *See ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 48 USPQ2d 1321 (Fed. Cir. 1998). "There should be something in the prior art or a convincing line of reasoning in the answer suggesting the desirability of combining the reference in such a manner as to arrive at the claimed invention." *In re Dembiczak* 175 F. 3d 994, 999 (Fed. Cir. 1999).

Accordingly, Claims 11 and 14 are novel and nonobvious over Nakamura et al (US 6,045,847) in view of Marlett et al (US 6,287,609) further in view of Barbera (US 5,425,945) and reconsideration and withdrawal of the rejection is respectfully requested.

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Rejection Under 35 USC 103(a) Over Colliopoulos (US 5,009,916) in view of Marlett et al (US 6,287,609)

The Examiner states that claims 1 and 28-32 are rejected under 35 USC § 103(a) as being unpatentable over Colliopoulos (US 5,009,916) in view of Marlett et al (US 6,287,609). The Examiner states that Colliopoulos shows that a psyllium high fiber drink mix made by agglomerating a base comprising at least 5 to 99 weight percent psyllium mucilloid is well known in the art. The Examiner concedes that Colliopoulos does not teach the ration of xylose to arabinose to be at least 3:1, for this the Examiner cites Marlett to disclose the preparation of fractions that are comprised mostly of xylose to arabinose. Applicants respectfully traverse this rejection based on the remarks contained herein.

Applicants assert that the arguments presented above regarding Colliopoulos and Marlett in traversing the § 103(a) rejection also apply to the present rejection. The references do not teach or suggest the essential polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3: 1, by weight, in combination with a dispersing component selected from the group consisting of binders, suspending agents, edible acids, and mixtures thereof that is disclosed and claimed in the present invention.

Colliopoulos teaches a psyllium high fiber drink mix made by agglomerating a base comprising at least 5 to 99 weight percent psyllium mucilloid. However, the present invention is directed to the use of agglomerate that comprises from about 10% to about 90% of a polysaccharide component that are fractioned off of the psyllium seed husk.

Marlett fails to teach or suggest a polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3: 1, by weight, and a dispersing component selected from the group consisting of binders, suspending agents, edible acids, and mixtures thereof that is disclosed and claimed in the present invention. "To establish prima facie obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art." MPEP § 2143.03 citing *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). "All words in a claim must be considered in judging the

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patentability of that claim against the prior art." MPEP § 2143.03 citing *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970).

The combination of Colliopoulos and Marlett does not teach or suggest each and every element of Applicants' presently claimed invention. The polysaccharide component in combination with the dispersing component of the present invention, therefore, cannot be rendered as obvious over the teachings of Colliopoulos in view of Marlett.

Accordingly, Claims 1 and 28-32 are novel and nonobvious over Colliopoulos (US 5,009,916) in view of Marlett et al (US 6,287,609) and reconsideration and withdrawal of the rejection is respectfully requested.

CONCLUSION

In light of the remarks presented herein, Applicants respectfully submit Claims 1-32 are allowable over the cited references. Reconsideration and allowance are respectfully requested. In the event that issues remain prior to allowance of the noted claims, then the Examiner is invited to call Applicants' undersigned attorney for further discussion.

Respectfully Submitted,

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